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THE INTERNATIONAL AIR NAVIGATION CONFERENCE, PARIS 1910

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THE first diplomatic conference to consider flight regulation met in Paris May 10, 1910 and adjourned June 29, 1910 without having signed a convention. It did not reconvene later as planned, and was technically a diplomatic failure.

But the influence of this conference on subsequent developments mark it as second in historical importance only to the 1919 conference after World War I when the celebrated Paris Convention was drafted and signed. When the 1910 conference met, no acceptable plan existed for international flight regulation. When the conference adjourned, it had completed all but a few clauses of a draft convention, including such subjects as aircraft nationality, registration, aircraft certificates, crew licenses, logbooks, rules of the road, transport of explosives, photographic and radio equipment in aircraft, and special provisions dealing with public aircraft. The conference also agreed that subjacent States might set up prohibited zones above which no international flight was lawful, recognized that cabotage could be reserved for national aircraft, and provided that the establishment of international air lines will depend upon the assent of interested States. These principles were to reappear in the Paris Convention of 1919 and certainly influenced the Chicago Convention of 1944.

Of even more importance is the now demonstrable fact that this 1910 conference, not the 1919 conference as usually supposed, first evidenced general international agreement that usable space above the lands and waters of a State is part of the territory of that State. The

debates of the conference and the draft provisions of the proposed convention, which were accepted in principle though not signed, show that States had concluded that they were entitled to regulate flight over their territories as fully as they had historically regulated other forms of human activity in national territory, and that no general freedom of international transit (innocent passage) for aircraft of all States existed as a matter of international law in the usable space over sovereign States.

Background of the Conference

When the conference met in 1910, international flight was practically unregulated. Free ballons took off from one State and landed in another, or wherever they might drift. The early zeppelins started on test and training flights from their base in Germany and directed their flight over Switzerland without consideration of the need for a permit. The French aviator Bleriot took off on his famous 1909 airplane flight and crossed the English Channel from France to Great Britain without thought of creating an international incident.

Between April and November of 1908 at least ten German balloons crossed the frontier and landed in France carrying over twenty-five aviators at least half of whom were German officers.[1] In November 1908 debates in the French Senate indicated that aviation should be considered both for its effect on national defense and on international commercial relations, and that regulation of the aerial frontiers must therefore be studied.[2] German balloons and their pilots had been well received by local French police and the people where they landed. However, fearing a disagreeable incident, the French Ambassador in Berlin called the situation to the attention of the German Government in 1908, and German military authorities were said to have promised immediate measures to prevent the further landing of German balloons outside German frontiers.[3]

But the French Government, still concerned, decided in December 1908 to invite the European powers to hold a diplomatic conference on the regulation of air navigation. The representations made at that time by France to Great Britain are most interesting. They referred to the difficulties that had been occasioned by the number of German balloons landing on French soil. The United States was not invited as it was deemed to be out of the reach of such incidents, and the conference was therefore limited to Europe.[4] In addition to calling the conference, the French Government took certain regulatory measures

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[1] Gaston Bonnefoy, *Le Code de l'air*, Paris, M. Rivière, 1909, pp. 186-190. See also: Giulio Castelli, "Il dominio dell'aria," *Rivista internazionale di scienze sociali e discipline ausiliarie*, Vol. 47, 1908, pp. 315-323.

[2] Speech by General Mercier in French Senate, November 5, 1908 in: *Journal officiel*, November 6, 1908, quoted by Georges Montenot, *La Circulation aérienne envisagée au point de vue juridique* (thesis—Dijon), Dijon, Dijon, 1911, p. 5.

[3] *Journal du droit international privé*, Vol. 36, 1909, pp. 596-597.

[4] See Official Minute dated May 1, 1910, quoted by Peter G. Maesfield in "Some Aspects of Anglo-American Civil Aviation," *United Empire*, Vol. 38, 1947, pp. 26-33.

to limit the number of balloon landings which had apparently continued in 1909 despite the earlier protests. The most important measure taken was an order issued March 12, 1909 by Clémenceau, then Minister of the Interior, addressed to the prefects of the French provinces. It stated that the frequency of landings of foreign balloons in France had led the government to give the matter serious consideration. It directed local authorities to hold such balloons for the collection of import duties, to obtain the details as to the purpose of the flight, and to advise the government in Paris by telegraph.[5] Such was the general background of the 1910 conference.

Program for the Conference

The invitation of the French Government was accepted by the following European States: Austria-Hungary, Belgium, Bulgaria, Denmark, France, Germany, Great Britain, Italy, Luxembourg, Monaco, Netherlands, Portugal, Roumania, Russia, Spain, Sweden, Switzerland, Turkey. In August 1909 a questionnaire was sent by the French Government to each State asking for preliminary official views on certain questions to be presented to the conference. The program was surprisingly narrow and technical in scope. It would appear that between December 1908 and August 1909 France had decided to avoid discussion of the fundamental question as to whether or not space used by international flight was part of the territory of the subjacent State or whether such space was free to the use of all States. The program therefore omitted any reference to the character of right or privilege by which the aircraft of one State might enter flight-space over the lands or waters of another State. The questions submitted included such matters as the distinction to be made between public and private aircraft, nationality, navigability certificates, registration, crew competence, technical rules applicable to departure of aircraft, and papers to be carried.[6] However, the program did include certain questions as to whether international rules should be imposed on aircraft landings. These questions approached closest to the problem as to whether German aircraft did or did not have a right to fly over French territory and land without French permission, the basic problem which in 1908 had led to the conference.

The replies received from certain governments forced a widening of the scope of the conference. Belgium, for example, stated that the question as to freedom of landing ought to be preceded by a question relative to the extent of the freedom of navigation,[7] and as a State whose neutrality had been guaranteed urged international agreement to determine the nature and extent of the rights of each State in space

[5] *Journal du droit international privé*, Vol. 36, 1909, pp. 1281-1283; *Revue juridique internationale de la locomotion aérienne*, Vol. 1, 1910, p. 24.

[6] Conférence internationale de navagation aérienne, Paris 18 mai-28 juin 1910, *Procès-verbaux des séances et annexes*, Paris, Imp. Nationale, 1910, pp. 9-10.

[7] Conférence internationale de navagation aérienne, Paris 18 mai-28 juin 1910, *Exposé des vues des puissances d'après les memorandums adressès au gouvernement français*, Paris, Imp. Nationale, 1909, p. 59.

above its lands and waters.[8] The Italian Minister of Public Works insisted that landings should be prohibited in military zones,[9] and recommended that the conference discuss whether or not a "territorial zone" ought to be established in which a State would exercise its sovereignty as in the case of territorial waters.[10] Russia appeared to support the view that, in principle, landing should be free except in prohibited zones,[11] but at the same time recommended that a further international conference should discuss the question of the rights of a sovereign State in the airspace above its territory.[12]

The German Government presented in advance as part of its reply to the questionnaire an entire draft convention. So far as present research will indicate this is the first multilateral air navigation convention ever prepared. It contained an entire chapter on "Admission of Air Navigation within the Limits of or above Foreign Territory."[13]

When the conference actually met, a supplemental question was added to the program entitled "Examination of the Principle of Admission of Air Navigation within the Limits of or above Foreign Territory; that is to say, Belonging to a State Other Than That from Which the Aircraft Comes." This supplementary question necessarily involved the fundamental problem of the legal status of flight-space and the extent of the authority of the subjacent State to regulate flight over its lands and internal waters. The positions taken by the various States and the decisions of the conference on this question were of paramount importance in the subsequent development of international air law.

French Position at the Conference

The chief of the French Delegation and president of the conference was the distinguished international lawyer, Louis Renault, for many years chief of the legal section of the French Foreign Office and a member of the Institute of International Law. At the first session Renault stated the apparent desire of the French Government to avoid a decision on the question of freedom of flight-space or State sovereignty. He recommended that the conference seek to reconcile freedom of air navigation with legitimate State interests, without being too much concerned with the abstract principles as to the nature of the rights of States over the atmosphere.[14] The French Government thus adopted in principle the position which had been taken by Paul Fauchille (also a member of the delegation) in his 1910 report to the Institute of International Law wherein he had said: "Air navigation is free. Nevertheless subjacent States reserve rights necessary to their self-

[8] *Ibid.*, pp. 111-112.
[9] *Ibid.*, p. 65.
[10] *Ibid.*, p. 88.
[11] *Ibid.*, p. 65.
[12] *Ibid.*, p. 90.
[13] For original French text of this draft convention as presented by the German Government see *ibid.*, pp. 93-104.
[14] *Procès-verbaux . . . , op. cit.*, p. 26.

preservation; that is, to their own security and that of the persons and goods of their inhabitants."[15]

The question of the admission of foreign aircraft was put on the program and referred to the First Commission of the conference. Kriege, chief of the German Delegation and legal adviser to the Foreign Office in Berlin, was chairman of this commission, and Fauchille was named as its reporter. The first formal statement of French views on the entry of foreign aircraft appeared in a memorandum submitted to the commission which bears every evidence of Fauchille's authorship. The formula there presented and recommended for conference adoption was: Air navigation is free. No restrictions may be adopted by States other than those necessary to guarantee their own security and that of the persons and goods of their inhabitants.[16]

The French memorandum also recommended inclusion in the convention of the definite restrictions to which States would be limited. These were: (1) prohibition of flight of aircraft in a zone below a certain height fixed by the convention; (2) prohibition of flight in the interest of national security above such places as fortresses; (3) prohibition of carriage by aircraft, without authority, of explosives, munitions, photographic and telegraphic equipment, and merchandise particularly dangerous from a customs point of view; (4) right of the subjacent State to exercise over aircraft in the airspace above its territory police and customs supervision; (5) right of the subjacent State to deny passage of foreign military and police aircraft through such airspaces; (6) right of the subjacent State to submit to its jurisdiction and laws those acts occurring on board aircraft affecting the right of self-preservation of such subjacent State.

The French position avoided any direct reference to freedom or sovereignty of flight-space. However, it seemed to assume the existence of a general international legal right of transit (innocent passage) and entry and landing for every State through flight-space over and into all other States.

At the opening of the conference the French Government had thus adopted Fauchille's position, including his failure or refusal (as evidenced in his earlier writings) to realize that a right of innocent passage did not necessarily exist in flight-space when recognized as part of the territory of the subjacent State. Certain of the fallacies in this position were made even more evident by the far-reaching proposed limitations on freedom of flight over subjacent States. These limitations were consistent with no legal theory except flight-space sovereignty of such

[15] *Annuaire de l'Institut de droit international*, Vol. 23, 1910, pp. 297-311. Fauchille since 1901 had been the leading advocate of freedom of flight-space, opposing the principle of State sovereignty. See: Paul Fauchille, *Le Domaine aérien et le régime juridique des aérostats*, Paris, A. Pedone, 1901; his reports in *Annuaire de l'Institut de droit international*, Vol. 19, 1902, pp. 19-86, Vol. 21, 1906, pp. 76-87; and his article, "La Circulation aérienne et les droits des états en temps de paix," *Revue juridique internationale de la locomotion aérienne*, Vol. 1, 1910, pp. 9-16. In 1910 he began to seek general acceptance of the formula "air navigation is free" as a compromise. However, he personally never receded from his original 1902 position that "the air is free."

[16] *Procès-verbaux*, *op. cit.*, p. 244.

subjacent State. Limitations of this character could have been made effective only in flight-space which was part of national territory, particularly as applied to aircraft of States which had not agreed to the proposed convention. Nor were these restrictions consistent with the normal right of innocent passage as recognized in maritime international law. They were far more drastic than those which an adjacent maritime State may exercise over foreign surface shipping passing through its territorial marginal sea.

It now appears in the light of history that what France really proposed at the opening of the conference was that sovereign States would by convention agree to the admission of foreign aircraft of all States, whether or not parties to the convention, but would restrict such international flight through territorial flight-space to no greater extent than directly authorized in the convention. The convention was thus to become a self-denying ordinance by which each contracting State would limit its rights of sovereign control over transport through its territory in aid of international air navigation.

German Position at the Conference

The German position was evidenced by the draft convention prepared and filed as the German reply to the French questionnaire, and referred to above. This is a document of great historical significance. It was the first concrete statement by a sovereign State of its position on the legal status of flight-space, and became the real basis for discussion at the 1910 conference. Its general plan and many of its articles found their way into the almost complete draft convention prepared by the conference itself.

Certain articles of the German draft disclosed that the government had accepted the theory of full and absolute territorial sovereignty in usable space over its lands and waters. This position had been previously stated by such German experts as Meurer, Zitelmann, and others. Article 11, for example, provided that aircraft of a *contracting* State should be *authorized* to take off, land, and fly over the territory of other contracting States — the key to the entire draft convention. By providing for authorization of foreign flight and limiting it to aircraft of contracting States, the convention thus in effect denied any general international law right of innocent passage or of entry of all foreign aircraft. Article 12 permitted the contracting States to regulate flight of other contracting States over its territory in the interests of security or protection of persons or property, provided that the same restrictions were applied to national aircraft. Article 14 provided for control of public air transport when not extending beyond the territory of the State — a reservation of cabotage; and also provided that the establishment of international air lines would be subject to the assent of interested States — a recognition that national economy as well as security was affected by international flight. Article 20 is particularly noteworthy in that it provided an undertaking by each contracting

State to require observance by *all* aircraft within or above its territory of the air navigation rules set out in the annex to the convention — a commitment as to the exercise of police power which no State could assume unless the flight-space above its lands and waters were a part of its territory.

It is evident that the German draft convention did not admit the existence of any right of entry of aircraft of non-contracting States, and evidenced a clear insistence on complete right of sovereign territorial control of flight over German surface territory. Superjacent usable space was treated as legally part of such territory.

During the conference the German Delegation filed an additional statement of its position.[17] This is a careful, shrewd, and not altogether frank, document. Standing alone it appeared in part to favor general freedom of air navigation subject to restrictions. However, the statement concludes with recommendations based directly on the theory of the German draft convention: (1) that aircraft should be authorized in principle to take off or land in or pass over foreign territory; (2) that the subjacent State should have power to limit such freedom of navigation on the condition that such restrictions must be determined by the interests of the security of the State or the protection of persons or goods of its inhabitants, and that foreign aircraft ought not to be treated less favorably than national aircraft; (3) that States should have rights of retorsion and of cabotage, outlined in the statement exactly as they had been in the draft convention. The only ambiguity arises from the use of the term "foreign territory" without limiting it to the territory of contracting States. To support the principles of national treatment for foreign aircraft and reservation of cabotage, the German statement cited the precedents of maritime treaties of commerce and navigation covering conditions of foreign entry into national ports and harbors. Such treaties grant privileges of entry and commerce only as between contracting States. The use of the reference to such treaties as precedents coupled with subsequent discussions in the commission makes it evident that the German statement had not changed the original position as evidenced by the draft convention. Germany still favored only those rights of entry into the airspace over foreign territory which would be authorized by a convention in the nature of the well-known reciprocal treaties of commerce and navigation.

British Position at the Conference

The British position at the opening of the conference was unequivocal. It recognized the existence in flight-space of private property rights of the landowner and of full sovereignty rights of the subjacent State. These principles were stated in a British interministerial memorandum dated October 11, 1909 filed with the French Government before the conference as part of the British reply to the questionnaire.[18]

[17] *Ibid.*, pp. 239-242.
[18] *Exposé des vues, op. cit.*, pp. 133-140.

The memorandum said that:

> "it is desirable that no regulation be instituted which implies in any manner whatsoever the right of an aircraft to fly over or land on private property, or which excludes or limits the right of every State to prescribe the conditions under which one may navigate in the air above its territory."

The British Government thus affirmed its full sovereignty in usable space over its surface territories. But it did not accept the dictum which had been put forward in 1906 by Westlake, the celebrated British professor of international law, who had supported the theory of sovereignty coupled with a right of innocent passage for foreign aircraft such as international law recognized for surface vessels through the marginal seas.[19] If the British Government had considered such international right of transit for foreign aircraft existed irrespective of convention, it could not have insisted on the reservation of the full right to prescribe conditions under which air navigation could take place above its surface territory. In maritime international law the adjacent State may exert some jurisdiction over foreign shipping passing through the marginal sea, but certainly not that character of complete control which Great Britain felt that it had a right to assert as to foreign aircraft over its surface territories.

During the sessions of the First Commission the British Delegation presented an additional statement of its position in reply to the German statement.[20] It objected to the establishment of general principles covering the right of aircraft to navigate above foreign territory or to land there. It stated that while wishing as far as possible to encourage the development of air navigation, it was necessary to safeguard the interests and sovereignty of the States. It further objected to the German proposals that foreign aircraft should not be treated less favorably than national aircraft. Concretely, it recommended that each State should have the right to take those measures it desired to restrain air navigation above its territory when indispensable to national defense, and that such power should permit the State to determine special locations for landing of foreign aircraft and to prescribe zones where flight would be prohibited. It recommended that each State, as a matter of international courtesy, ought to agree to arrange all reasonable facilities for foreign aircraft to fly above its territory or to land there, subject to such restrictions as it believed indispensable to assure the security of its nationals.

Discussions in the First Commission

The discussions in the First Commission of the conference on the question of the admission of foreign aircraft resulted in a decision that each contracting State would admit the flight of aircraft of other contracting States within and above its territory subject to certain re-

[19] See statement of Westlake at Institute of International Law 1906 session, *Annuaire de l'Institut de droit international*, Vol. 21, 1906, p. 297.

[20] *Procès-verbaux, op. cit.*, pp. 269-272.

strictions to be discussed hereafter. This was in substance the original position stated in the German draft convention.

When Kriege, chairman of the German Delegation, as president of the First Commission opened the discussion the British statement had not been filed. He called the attention of the commission to the French and German statements, saying that they were in agreement on essential points, that both favored in principle freedom of air navigation subject to restriction, that subjacent States had a right to take measures necessary to guarantee their own security and that of the persons and goods of their inhabitants. Kriege was careful not to define freedom of air navigation. He noted that the German statement proposed to limit the right of restriction by a provision that no restriction could be applicable to foreign aircraft if it were not equally applicable to private aircraft. Discussing certain of the detailed restrictions supported by the French statement, he concurred in the advisability of providing that each State have a right to exercise police and customs supervision in the atmosphere above it and also a right to prevent unauthorized passage of foreign military and police aircraft.

Fauchille, replying, pointed out the difference between the German and French proposals as he understood them. The French desired to have the restrictions which a State could adopt set out in the convention, while the German proposal would leave to each State the power to determine for itself those restrictions which it desired to impose. Fauchille considered that this would open the way to arbitrary action.

The British Delegation then presented its statement objecting to the German proposal. The Dutch chief delegate expressed his agreement with the British in opposing any general statement of freedom of air navigation, being particularly concerned as to the manner in which it would limit the right of each State to adopt local penal and regulatory statutes. The Swiss chief delegate also supported the objection to any general statement of freedom of navigation, stating that if any principle must be accepted, Switzerland would "reserve the principle of sovereignty."

During the discussion of the British statement the divergent French and German views as to freedom of navigation became apparent. Renault seemed to support a rather vague general right of international passage based on the fact that aircraft were actually flying from one State to another.[21] Kriege's statement was extremely guarded but certainly implied that obligation of a State to admit foreign aircraft would depend on an international convention.

The Austrian delegate added his objection to the formula that air navigation was free. He was not prepared to admit that freedom of navigation should be restrained only in the interest of security of the State, nor would he accept the formula that foreign aircraft should

[21] *Ibid.*, p. 266. A careful examination of all the debates does not disclose any reference by Renault or the French Government to the concern that that government had felt in 1908 and 1909 resulting from the continued flight of German balloons into and over French territory.

always be treated in the same manner as national aircraft. He supported in full the British position.

In the face of continued opposition to the formula that air navigation was free, Kriege clarified the German position in replying to the Dutch delegate, stating that he believed that the expression "freedom of air navigation" was the thing most displeasing to the Dutch delegate, and adding:

> "but that expression does not figure in the German proposals — it is only a question of the admission of aircraft within the limits of and above foreign territory. It is not a matter of complete freedom but only the obligation of admission. Everything concerning the penal laws and jurisdiction remains outside the German proposal."[22]

Certainly Kriege was supporting the adoption of a convention which, by its terms, would obligate contracting States to admit aircraft of other contracting States, and was not going further in supporting any theory of a general international law right of innocent passage.

The main question was then referred to the examining committee of the commission. At the same time the commission adopted without debate the three original German proposals as to cabotage, as to the establishment of international air lines depending on the assent of interested States, and as to the right of retorsion.[23]

At a later session of the Commission, Kriege reported the decisions of the examining committee as to the admission of air navigation within the limits of or above foreign territory,[24] and presented the following rules recommended by the committee:

> *Rule* 1: Each contracting State shall permit the navigation of aircraft of other contracting States within the limits of and above its territory subject to restrictions necessary to guarantee its own security and that of the persons and goods of its inhabitants.
>
> The contracting States undertake to conform the private law of their countries to the preceding paragraph.
>
> Sojourn required by necessity can not be refused in any case to aircraft of a contracting State.
>
> *Rule* 2: The restrictions imposed by a contracting State, pursuant to Rule 1, paragraph 1, will be applied without any inequality to national aircraft and to aircraft of every other contracting State.
>
> This obligation does not cover measures which a State should take in extraordinary circumstances to assure its national defense.
>
> *Rule* 3: Each contracting State has the power to reserve the professional transport of persons and goods between two points on its territory to national aircraft alone, or to aircraft of certain contracting States, or to submit such navigation to special restrictions.
>
> The establishment of international air lines depends upon the assent of interested States.
>
> *Rule* 4: With regard to a contracting State which imposes restrictions of the kind foreseen in Rule 1, paragraph 1, analogous measures may be applied by every other contracting State.

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[22] *Ibid.*, pp. 280-281.

[23] *Ibid.*, p. 281. The provisions as to cabotage and establishment of "international lines" are of great importance. The German proposals generally would have admitted private aircraft of all contracting States for any purpose, commercial or otherwise. These provisions severely restricted general rights of transit and commerce granted between contracting States.

[24] *Ibid.*, pp. 315-318.

Rule 5: The restrictions and reservations contemplated by rules 1 to 4 shall immediately be published and notified to the interested governments.[25]

Discussing these rules, Kriege stated that the committee did not wish to give a theoretical definition of the idea of free admission, that it had limited itself to establishing practical rules to reconcile different interests, and that accordingly the committee proposed as a rule that each contracting State should permit the navigation of aircraft of other contracting States within the limits of and above its territory subject to restrictions necessary to guarantee its own security and that of the persons and goods of its inhabitants. "It is in this sense" said Kriege "that the admission of aircraft to air navigation has been fully recognized."[26] He further reported the committee's decision that each State should accord the same treatment to foreign aircraft as to national. Thus Kriege succeeded in obtaining the adoption of rules as to admission of aircraft consistent with the theory of the original German draft convention.

Complete agreement existed on the important first paragraph of Rule 1 which limited the obligation of contracting States to permitting flight of aircraft of other contracting States, thereby implying that no obligation existed to admit aircraft of other States. But as to equal treatment of national and foreign aircraft, Admiral Gamble, chief British delegate, immediately stated his objection. He said that the application to national aircraft of the same restrictions as to foreign was not acceptable to the British Delegation, that the British Government would find itself in the impossible position of granting special navigation facilities to its nationals and being obliged to grant the same to the whole world. The Austrian and Russian delegates made similar reservations.

Subject to these reservations the proposed rules were adopted by the First Commission and ordered reported in its behalf to the conference.

Discussion in the Conference

The report of Fauchille, including the proposed rules as recommended by the First Commission, was duly presented to the conference.[27] This report, together with reports of the other conference commissions, was referred to a drafting committee including Renault (France), Kriege (Germany), and Gamble (Great Britain). On June 24th Renault presented a proposed draft convention complete except as to Article 19 and 20.[28] The missing articles, as Renault explained, concerned the principle of the admission of air navigation within the limits of or above the territory of a foreign State which had raised "delicate questions." He proposed to the conference that it adjourn discussion on this matter.

[25] *Ibid.*, pp. 322-323.
[26] *Ibid.*, p. 315.
[27] *Ibid.*, pp. 97-104.
[28] *Ibid.*, p. 39.

The missing articles covered the substance of Rules 1 and 2 as recommended by the First Commission. With these omissions the proposed convention, as recommended to the conference by the drafting committee, was adopted.[29]

At the conclusion of the conference session of June 24th, where the draft had been adopted, the chief Swiss delegate proposed an indefinite delay so that governments might have an opportunity to examine the convention before signature. This proposal was withdrawn so that the conference could adjourn for five days to give the drafting committee further opportunity to complete Articles 19 and 20.

The conference reconvened on June 29th. The British delegation presented an amendment[30] covering Rules 1 and 2 as to the admission of aircraft (the missing Articles 19 and 20 of the draft convention), thus disclosing the only points on which disagreement appeared to remain. The British proposal would have amended the second paragraph of Rule 1 to read: "The contracting States undertake to *take every practical measure* to conform the private law of their countries to the provisions of the preceding paragraph." The words in italics were the only material change. Paragraph 2 of Rule 2 would have been amended to read: "This obligation does not cover measures which a State should take to assure its security." This differs from the original rule adopted by the commission principally in substituting the word "security" for the words "national defense," and omits the words "in extraordinary circumstances" which appeared in the commission rule. The British proposed amendment also included a suggested Rule 2A which would read:

> "Notwithstanding the provisions contemplated in Rules 1 and 2, each contracting State reserves the right to forbid air navigation or regulate it as seems fit to such State in certain zones of reasonable extent."

The British added a note citing the report of the Second Commission of the conference,[31] which had recommended a rule that "each State remains free to regulate at its will the prohibition of flight and landing in certain zones and to determine to whom such prohibition will be applied."

The British position on the last day of the conference may be summarized as follows: (1) It would not accept an absolute commitment to amend British law to cover the right of flight of foreign aircraft over private property, but proposed to take every practical measure to that end; (2) it was prepared to modify its prior objection to the application of national treatment to foreign aircraft provided that this obligation did not apply to any measure which the State took to ensure its security; (3) it insisted on a clear statement of the right of each State to set up prohibited zones, apparently not being satisfied with the indirect reference to prohibited zones in Articles 23 and 24 of the draft

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[29] *Ibid.*, pp. 188-225.
[30] *Ibid.*, p. 65.
[31] *Ibid.*, p. 142.

convention as adopted. Neither the original Rules 1 and 2 of the First Commission nor the British amendments were submitted to the final vote of the conference. The British chief delegate moved adjournment of the conference because "the British Government feels that the great importance of the questions which had been treated by the commissions makes necessary a profound examination by the Government itself before the draft convention may be approved.[32] A tentative date of November 29, 1910 was set for the conference to reconvene, but efforts to reconcile the existing differences of opinion were unavailing and the conference was never called back into session.

Conference Disagreements Were Political, Not Legal

The failure to reach a final draft convention at Paris in 1910 on regulation of air navigation was almost entirely political. When the conference adjourned, only one legal point stood between Great Britain on one side and Germany and France on the other. This involved the legal status of private property rights in flight-space. The continental powers did not deny the existence of rights of the landowner in space over his surface properties, but they felt that each State must undertake to make such changes in its local laws as were required to permit foreign aircraft to enjoy the flight privileges granted by such State without interference from local landowners. As stated in the previous section, Great Britain finally suggested that it would "take all practical measures" to conform its local laws to the proposed convention. No one can suppose that compromise on this question would have been impossible if other non-legal questions could have been solved.

The real causes of the breakdown of the conference were political. Must restrictions on freedom of flight imposed by each State be applied equally to national aircraft and to aircraft of all other contracting States? Such "national treatment" for foreign aircraft was first proposed in the original German draft convention, was repeated in the German statement to the First Commission, and was urged in debate. It was opposed by Great Britain, Austria-Hungary, and Russia.[33] It was, however, included in the rules reported to the First Commission by the examining committee with the evident concurrence of France, and was adopted by that commission. Great Britain finally went so far as to suggest a compromise amendment offering to accept such national treatment of aircraft of other contracting States except as to "measures which a State takes to assure its security." This would have left contracting States a free hand as to national security measures, but would have required them to apply the same treatment to national and foreign aircraft insofar as safety regulations for the protection of per-

[32] *Ibid.*, p. 62.

[33] *Ibid.*, p. 102. See also Russian declaration [*Ibid.*, p. 179] as to Articles 19 and 20, stating that the principle of equality of treatment of nationals and foreigners in matters of air navigation could not be accepted by the Russian Delegation for various reasons, including the fact that this principle would affect the integrity of the sovereign rights of a State in matters of internal legislation.

sons and property were concerned. This was apparently not acceptable to Germany and France and the conference adjourned.

Neither the German nor French positions have ever been adequately explained. As to Germany it has been assumed, and perhaps rightly, that its great technical progress in the design and construction of the zeppelins and other dirigibles for both military and civil use had put it so far ahead of other European powers that it would have much to gain and little to lose by an exchange of the widest possible flight privileges.[34] As to France the 1910 position is even more difficult to understand. It had invited the European States in 1908 to attend this conference largely because of its concern arising from the uncontrolled flight of German balloons into French territory. But at the conference France first supported Fauchille's formula for general freedom of air navigation subject only to restrictions required by national security — these restrictions to be stated in the convention. Defeated on that proposal, France apparently then accepted the German thesis under which it could have imposed no restrictions on German aircraft entering France without imposing similar restrictions on its own aircraft — the only exception being as to measures which it might take "in extraordinary circumstances to assure its national defense."

The conference came to final disagreement on this purely political question as to what restrictions could be applied by the subjacent State to aircraft of other contracting States. The breakdown was not, as popularly supposed, due to opposed theories of freedom of the air and State sovereignty.

General Understanding on State Sovereignty of Usable Space

Contrary to general understanding, the Paris 1910 conference did not break down because of a fundamental difference between Great Britain on one side and Germany on the other as to sovereignty or freedom of usable space. As a matter of fact at the close of the conference no State denied its legal *right* to restrict foreign flight over its surface territories. Agreement, though tacit, existed as to the legal status of flight-space. The only open problem was the political extent to which States should exercise their existing powers of control without unnecessarily impeding future development of international flight.

At Paris in 1910 the European States, for the first time since the Franco-Prussian War, were brought face to face with decisions involv-

[34] Catellani, writing about a year later, said that "in consequence of the more considerable progress made by Germany in the control of aircraft and in the formation of an air fleet more complete liberty for international navigation of aircraft would be more advantageous to the empire and to the expansion of its military power." [Enrico Catellani, *Il diritto aereo*, Turin, Bocca, 1911, pp. 100-101. Also translated into French by Maurice Bouteloup, *Le Droit aérien*, Paris, A. Rousseau, 1912.]

It is known that the German Government consulted von Zeppelin before accepting the French invitation to participate in the 1910 conference. Decision to accept the invitation was made at a meeting in the German Foreign Office at which he was present. [*Zeitschrift für Völkerrecht und Bundesstaatsrecht*, Vol. 4, 1910, p. 292.] This would appear to strengthen the view that the German position was based on its existing technical superiority and the desire for a convention which would give great latitude to the operation of German dirigibles.

ing the legal status of flight-space. The efforts of the French Government to keep this question out of the conference could never have been successful if a convention was to be drafted and signed. No conference could agree on the regulation of any phase of international transport in the absence of understanding as to whether the transport medium dealt with was or was not part of national territory. Thus treaties of commerce and navigation on the entry of surface shipping would be quite meaningless unless a stated or tacit understanding existed between the parties that the ports of entry concerned were within the national territory of the State authorizing foreign entry.

An examination of three articles of the draft convention approved at the plenary session of the conference shows that the government delegations then understood and acted upon the legal assumption that flight-space over the national lands and waters was part of the territory of the subjacent State in which such State had complete and exclusive power to control all human activity including foreign flight. To the same effect are those parts of Rules 1 and 2 adopted by the First Commission on which no dispute existed.

Article 2 of the draft convention would alone determine the correctness of this assertion. Its first paragraph provided that an aircraft "is only governed by the present convention if it possesses the nationality of a contracting State." The second paragraph adds: "None of the contracting States shall permit free balloons or airships to fly over its territory unless they comply with the above conditions, though special and temporary authorization may be granted." This is an undertaking by each contracting State to prohibit the entry of all free balloons or airships except those possessing the nationality of contracting States or those specially authorized by such State. It is equivalent to the assertion of full and absolute sovereignty of the superjacent State with exclusive power to control all flight over its surface territories.

Article 30 is equally conclusive. Taken almost directly from the German draft convention, it provided that each State undertakes to require the observance by all aircraft "within the limits of or above its territory" of the rules relating to air traffic contained in an annex to the convention and "to punish those which fail to do so." This annex included aircraft lights and signals and rules of the road. No State could sign a convention containing a commitment of this character unless flight-space over its surface territories was also a part of its national territory in which its regulatory and penal statutes were exclusively effective.

Article 34 provided that the carriage of goods by air could take place only by virtue of special agreements between States concerned or pursuant to their legislation — a provision difficult to enforce if the flight-space involved was not part of national territory.

Interesting, though not so conclusive, are Articles 23 and 24 as to prohibited zones, Article 29 as to the exercise of police jurisdiction and customs supervision above national surface territory, and Articles 35,

36 and 38 governing the carriage of explosives, munitions, photographic and wireless apparatus.[35]

While the rules as to admission of foreign aircraft adopted by the First Commission did not come before the conference for formal approval, such parts of those rules as were not disputed certainly represent the conference position of the delegations of the principal European States. No objection was made by any State to the first paragraph of Rule 1. In legal effect it created an obligation requiring that each State should permit navigation of other contracting States in superjacent flight-space. If the aircraft of foreign contracting States already had the right to fly over the subjacent contracting State, the permission of the latter would not have been required. The adoption of this rule evidenced understanding that flight-space over each contracting State was part of the territory of that State and that no right of innocent passage or right of entry then existed through such space.

In the French statement on the entry of foreign aircraft a recommendation was made that the convention should include a restriction

[35] The paragraphs mentioned above are as follows:

Article 2: An aircraft is only governed by the present Convention if it possesses the nationality of a contracting State.

None of the contracting States shall permit a free balloon or airship to fly over its territory unless it complies with the above condition, though special and temporary authorization may be granted.

Article 23: The restrictions and reservations contemplated in Articles 19, 20, 21, and 22 shall immediately be published and notified to the Governments concerned.

The forbidden zones shall be defined with sufficient precision to enable them to be shown on aeronautical maps of a scale of at least 1/500000. The contracting states shall be obliged to communicate these maps to one another.

Article 24: As soon as the pilot of any aircraft perceives that he has entered the air space above a forbidden zone he must give the signal of distress specified in Article 16 of Annex (c) and land as soon as possible; he must also land if requested to do so by warning given from the ground. Each State shall give notice of the warning signals which it has adopted.

Article 29: The authorities of the country will always have the right to visit the aircraft on its departure and landing, and to exercise in the atmosphere above their territory police jurisdiction and customs supervision.

Each State can enact that if an aircraft of another contracting State lands on its territory the nearest police or customs authorities must immediately be notified.

The personnel on board the aircraft must conform strictly to the police regulations and provisions of the customs laws of the country.

Article 30: Each State undertakes to enact that all aircraft within the limits of, or above, its territory, and all its own aircraft within the limits of, or above, the territory of another contracting State shall comply with the "Rules relating to Aerial Traffic" annexed to the present Convention (Annex (6)) and to punish those which fail to do so.

Article 34: The carriage of goods by air can only take place in virtue of special conventions between the States concerned or of the provisions of their own legislation.

Article 35: The carriage by aircraft of explosives, arms, and munitions of war, and of traveler and other carrier pigeons, is forbidden in international traffic.

Article 36: Each State can forbid or regulate the carriage or use of photographic apparatus above its territory. It can cause the negatives found on board a foreign aircraft landing on its territory to be developed, and can, if necessary, seize the apparatus and negatives.

Article 38: Each State has the right to authorize aircraft within the limits of and above its territory to carry on board a radio-telegraphic apparatus. Such apparatus cannot, without special permission, be used except when the safety of the aircraft is concerned.

Procès-verbaux, op. cit., pp. 188-189. English translation from *Reports of the Civil Aerial Transport Committee . . .*, London, H. M. Stationery Office, 1918, Cd. 9218 (Appendix A to Report of Special Committee No. 1).

prohibiting aircraft navigating below a height to be stated in the convention, so as to protect the population against the indiscretions of aircraft and the noise of their motors. The German delegation opposed this proposal and it had no support. The draft convention as approved by the conference and the rules adopted by the First Commission all dealt with flight-space as being subject to uniform regulation at whatever height used. The conference clearly rejected any division of usable space into horizontal zones.

As stated in previous sections, the French position at the opening of the conference recommended the inclusion in the draft convention of the proposal that air navigation is free. If any result of the conference is clear, it is the formal rejection of this theory. The first paragraph of Rule 1 as adopted by the First Commission is a negation of the principle of general freedom of air navigation. From the time the formula was first suggested in doctrinal discussions it had been supported on the theory that it was legally based on either freedom of the air (no State sovereignty in flight-space) or a right of innocent passage through such flight-space as was subject to State sovereignty. The direct refusal of the Paris 1910 conference to accept this formula was a denial both of freedom of the air and of the existence of a right of innocent passage. The articles of the draft convention and the undisputed rules of the First Commission also indicate the refusal of the governments represented at the conference to accept the Westlake dictum as to a right of innocent passage, and are consistent only with full and absolute State sovereignty in superjacent space, including the right of each State to regulate as it deemed fit the entry of foreign aircraft.

In summary, the Paris 1910 conference evidenced tacit but actual agreement of the delegations of the States there represented: (1) that each State had full sovereignty in flight-space over its national lands and waters as part of its territory; (2) that any division of such territorial flight-space into zones is impractical and unnecessary; (3) that no general right of international transit or commerce exists for aircraft of other States through such territorial flight-space. The conference demonstrated that the only practical legal method of regulating international flight was by international agreement providing for the grant of privileges of entry under terms and conditions there stated.[36]

[36] In *The Right to Fly*, published in 1947, I discussed certain of the legal and political questions [pp. 19-20] and stated an opinion as to the general views of the conference in the controversy between freedom and sovereignty of the airspace. On the latter question I said [p. 33]: "Although no one was willing to admit it, the fact is that had a majority rule been in effect at the Paris conference in 1910 and had a vote been taken, a convention might then have been adopted on this majority vote solemnly recognizing as the long-established Law of Nations that 'the air is free.'" Several years of intense research since *The Right to Fly* was written convince me that the conclusions which I reached in the statement above are unsound. Factually, the vote at the 1910 conference, adopting the draft articles of the proposed convention, was a vote in favor of sovereignty and against freedom of the air. Politically, as I am now convinced, a majority of States present at Paris in 1910 would have gone further and voted against freedom of the air and in favor of a definite statement of State sovereignty had a vote on the direct issue been taken.